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tition of the people by a shifting of patronage²⁶ from one form of a public service to another, for example from the street railway to the steam railroad,²⁷ or from both to the jitney,²⁸ has proved a very effective weapon of defense against higher rates in spite of the modern policy. And always lurking in the background is the competition from various forms of private business, the wood lot, the coal yard, and the kerosene cart, ever ready competitors of the luckless gas plant.²⁹

It must be recognized that protection of the public utility enterprise from competition can, of necessity, be but an incident in the new policy of comprehensive regulation for the conservation of the public interest which so admirably adapts itself to the actualities of the business facts.

TAXES MEASURED BY WEALTH. — The theory that foreign chattels have a *situs* at the domicile of the owner so as to be taxable there is now fallen into disrepute;¹ where such a tax is imposed it is properly viewed as a personal tax, the amount of which is determined by the wealth of the subject.² The practice of measuring taxation by wealth, however, may be subject to constitutional limitation. In the case of a tax on property the fundamental law of the states usually requires that the amount taken be fixed by the value of the thing taxed.³ On the other hand, if the tax is *in effect* either a privilege tax or a tax on the person,⁴ the method of fixing the rate is not thus limited by constitutional prescription. "Due process of law" and the "equal protection of the laws" do not demand absolute equality of taxation,⁵ and privilege and personal taxes will not run foul of these guarantees unless unnecessarily unfair,⁶

tion; also: Milk and Cream Rates to Philadelphia, Pa., 45 I. C. C. Rep. 379 (1917) — automobile truck and wagon competition with steam railroad.

²⁶ Bedford-Fulton Telephone Co. v. Chapmans Run Mutual Co. (Pa. Pub. Serv. Com'n), P. U. R. 1919 A, 911 — holding commission had no authority to prevent a patron changing to a competing public service company.

²⁷ Re Interurban Railroads (Ind. Pub. Serv. Com'n), P. U. R. 1919 F., 192 — competition between interurban and steam railroads; Re Massachusetts N. E. St. Ry. Co. (*supra*, note 25) — steam railroad competition with street railway.

²⁸ Re Union St. Ry. Co. (Mass. Pub. Serv. Com'n), P. U. R. 1919 C, 900 — competition between jitneys and street railway; Re Pearl (Nevada Pub. Serv. Com'n), P. U. R. 1919 F, 299 — auto-truck competition with steam railroad; Re King (Cal. Railroad Com'n), P. U. R. 1919 F, 377 — competition of auto stage with steam railroad; Re Increased Freight Rates (Ind. Pub. Serv. Com'n), P. U. R. 1918 F, 304 — competition of auto-transportation with interurban electric railways.

²⁹ This was pointed out in Pub. Serv. Com'n of Washington v. Puget Sound Gas Co. (Washington Pub. Serv. Com'n), P. U. R. 1918 F, 728, where the commission said: "We have here a contest between the coal mine, the forest, and the hydroelectric plant, on one hand, and gas upon the other."

¹ Hoyt v. Commissioners of Taxes, 23 N. Y. 224 (1861).

² See Joseph H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 590.

³ See JUDSON ON TAXATION, § 438, and appendix, pp. 760 *et seq.*

⁴ Although the legislature may have had in mind the kind of tax which was beyond its constitutional power, if the courts can uphold the tax on some other theory as to its nature, they will do so. See Nicol v. Ames, 173 U. S. 509, 515 (1899). See JUDSON ON TAXATION, § 519.

⁵ See BEALE ON FOREIGN CORPORATIONS, §§ 508, 509, 465; JUDSON ON TAXATION, § 450; GRAY, LIMITATIONS OF TAXING POWER, § 1122.

⁶ Hatch v. Reardon, 204 U. S. 152 (1907); People *ex rel.* Farrington v. Mensching,

plainly discriminatory, or unequal in their application to subjects placed, for the purposes of taxation, in the same class.⁷

Only the law of the domicile may impose a tax on the person.⁸ As has been suggested, a tax imposed by the state of the domicile on foreign chattels is to-day regarded in this light. If the state can tax its citizens and compute the tax on the basis of their foreign movable estate as well as property at home, there is no logical reason why foreign land could not also be made the basis of computation.⁹ But the maxim *Mobilia sequuntur personam*, indicating that movables may be distributed according to the law of the domicile, was given a larger meaning by the courts.¹⁰ They went so far as to give movables a fictitious *situs* for taxation at the domicile, and by way of compensation treated foreign land as peculiarly immune. The consequence is an apparent absence of cases in which a direct tax on foreign immovables has been sustained as a personal tax at the domicile based on wealth.¹¹ In *Union Transit Co. v. Kentucky*¹² the Supreme Court, in disregard of settled practice, decided that it was a denial of due process for the state of domicile to tax tangible movable property permanently situated and taxable abroad. Hence as to both foreign land and chattels the question is the same — can a state accomplish indirectly by means of a personal tax what it cannot do directly? The fact that the Supreme Court in the Transit Company case ignored the personal feature of the tax is some evidence that such a proceeding will be discountenanced, but the question must be considered as still open.

Inheritance taxes, one form of privilege or license taxation, may be imposed by the state of the decedent's domicile on the succession to chattels in another state, the rule of *Union Transit Co. v. Kentucky* having been expressly declared inapplicable to inheritance taxation.¹³ Here again the *mobilia sequuntur personam* idea was the theoretical panacea. A better justification is that although foreign movables pass according to the law of the actual *situs*, the rule of distribution is furnished by the state of the domicile which, having furnished something, is entitled to tax its enjoyment.¹⁴ But since the state where the goods

187 N. Y. 8, 79 N. E. 884 (1907). See 19 HARV. L. REV. 460; 20 HARV. L. REV. 408. In *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512 (1894), it was held that an inheritance tax exempting estates under \$10,000 was valid under a constitutional provision requiring taxes to be reasonable. See 8 HARV. L. REV. 226.

⁷ *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283 (1898); *Booth's Ex'r v. Commonwealth*, 130 Ky. 111, 113 S. W. 61 (1908); *In re Fox's Estate*, 154 Mich. 5, 117 N. W. 558 (1908). See 12 HARV. L. REV. 127.

⁸ *The State v. Ross*, 23 N. J. L. 517 (1852).

⁹ "Logically there is no reason why, in taxing its residents, the state may not measure such tax by reference to their realty outside the state, as well as by any other method. The reason it cannot be done in fact is that such taxation would be so contrary to the settled habits of our governments and peoples as to be a denial of due process of law." GRAY, LIMITATIONS OF TAXING POWER, § 168 a.

¹⁰ *Hoyt v. Commissioners of Taxes*, *supra*, p. 228.

¹¹ Since domestic corporations owe their existence and capacity to own property, wherever situated, to the state of creation, a tax on the capital stock representing in part foreign land is sometimes upheld. *Kansas City Ry. v. Kansas*, 240 U. S. 227, 232 (1916). *Contra*, *Commonwealth v. American Dredging Co.*, 122 Pa. 386, 15 Atl. 443 (1888).

¹² 199 U. S. 194 (1905).

¹³ 199 U. S. 194, 211 (1905).

¹⁴ See Joseph H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 590, 628 *et seq.*

are can distribute them in accordance with the law of the domicile or otherwise at its pleasure, this explanation is also unconvincing. The alternative remains to conclude either that the practice is theoretically unsound or that only the transfer of property within the jurisdiction is taxed, but that the amount taken is based on the wealth of the decedent exclusive of foreign realty.¹⁵ Under this last theory such deduction must be explained as a historical survival. Since the visible result is the same under any theory supporting the levy on foreign transfers, the law being settled that the state of the domicile can so tax, we must turn to the case of non-residents as affording the most illuminating test of taxes in proportion to wealth.

Here if foreign wealth, either movable or immovable, is to be taxed, it must be done indirectly in the form of privilege taxation. Suppose, for example, for permitting the succession to property owned by a non-resident within the state the state deducted a fixed percentage of the entire wealth of the decedent.¹⁶ Another device, slightly less outrageous, would be to increase the rate of taxation in proportion to the entire estate of the non-resident.¹⁷ Or the state might appropriate a certain percentage of the entire property received by the beneficiary. A more moderate method would make the rate of taxation depend on the entire amount received. This was in substance the theory of the New Jersey Inheritance Law,¹⁸ the constitutionality of which was lately confirmed by the Supreme Court in *Maxwell v. Bugbee*.¹⁹ The dissenting opinion written by Mr.

In re Cumming's Estate, 142 App. Div. 377, 127 N. Y. Supp. 109 (1911), upheld a tax on the succession to California property on the ground that the decedent died domiciled in New York although the California court had found him domiciled in California and had distributed the property in accordance with California law. The result of this case, if supported at all, must be explained on some other theory than the one suggested. See 24 HARV. L. REV. 573.

¹⁵ It has been held that the federal government has even greater power to tax its citizens in respect to property held abroad and privileges exercised there than have the states. A federal license tax on vessels permanently in foreign waters has been held due process of law under the Fifth Amendment. *United States v. Bennett*, 232 U. S. 299 (1914). In the light of the great benefits conferred on its citizens by the national government one might expect greater latitude would be allowed it in assessing personal taxes on the basis of wealth. Perhaps the *Bennett* case may be supported on this ground. See 27 HARV. L. REV. 675.

¹⁶ In *People v. Equitable Trust Co.*, 96 N. Y. 387 (1884), a privilege tax of \$.0015 on the dollar on the cash value of the capital stock of a foreign corporation was sustained. On the other hand in *St. Louis S. W. Ry. v. Arkansas*, 235 U. S. 350, 364 (1914), a tax of \$.0005 was imposed on foreign corporations "upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this state." In holding the tax due process of law the Supreme Court (opinion of Mr. Justice Pitney) relied on the fact that the tax was "measured by reference to property situate wholly within confines of the state."

¹⁷ For example, the inheritance tax act might provide that where the decedent's wealth was under \$10,000 the beneficiary should pay 10 *per centum* of the amount of the bequest; where the decedent's wealth was between \$10,000 and \$20,000, 20 *per centum*, etc. It was argued with some merit in *Magoun v. Illinois Trust & Savings Bank*, *supra*, that the act in question determined the rate in this fashion, but the court decided (page 298) that it was "... the estates which descend or are received which . . . are to pay a tax in proportion to their value." Had the act been given the construction contended for, it is questionable whether it would have been upheld.

¹⁸ See PAMPH. L. 1909, p. 325, as amended PAMPH. L. 1914, p. 267.

¹⁹ U. S. Sup. Ct. Nos. 43 and 238, October Term, 1919. See RECENT CASES, p. 616, *infra*.

Justice Holmes and concurred in by the Chief Justice and Justices Van Devanter and McReynolds suggests that in a flagrant case of assessment on the basis of wealth a majority would be opposed. Mr. Justice Holmes thought that "when property outside the state is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used." Of course if the doctrine of *Union Transit Co. v. Kentucky* should be carried so far as to immunize all tangible property abroad from both property and transfer taxation, then it might well be held that such property is exempt for all purposes. Moreover, it may be hoped that the law will take such a direction. But in the light of actual decisions is it sound to conclude that *any* valuation of foreign property to determine the rate of taxation is an attempt to accomplish indirectly with "ulterior purpose" what is beyond the "constitutional power"? An affirmative answer would deprive the practice of taxing foreign wealth, or its transfer, at the domicile, of its only sound theoretical foundation. For why is not a tax at the domicile when based in part on foreign wealth as much a tax on such wealth by indirection as is a privilege tax similarly assessed against a non-resident? That theory is best which without resorting to fictions may be reconciled with the most decisions which are still law. The majority view that "property not in itself taxable by the State may be used as a measure of the tax imposed" seems the more workable. The purpose and effect of the New Jersey statute was to prevent beneficiaries of non-resident decedents from escaping the increased rates on larger bequests.²⁰ Consequently the decision does not seem objectionable.²¹ Only when taxation measured by wealth is carried beyond the line of fairness should it be upset, and then not as being in substance a levy on something beyond the jurisdiction, but as being so unreasonable and out of proportion to the benefits conferred as to be a denial of due process and the equal protection of the laws.²²

PROHIBITION AND THE WAR POWER. — Since the time of Chief Justice Marshall's illuminating comments as to the branches of the government in whose province political questions lie,¹ there would seem to have been reason for the assumption that in such an exclusively political question as whether or not the country is still at war the Supreme Court would be reluctant to interfere with the legislative and executive decision. The

The leading New Jersey case under the law as amended is *Maxwell v. Edwards*, 89 N. J. L. 446, 99 Atl. 207 (1916).

²⁰ For an illustration of the method of the New Jersey law see *Maxwell v. Edwards*, 90 N. J. L. 707, 101 Atl. 283 (1917).

²¹ The law was also attacked as a denial of privileges and immunities under Article IV, Sec. 2, of the Federal Constitution. On this question see *Ward v. Maryland*, 12 Wall. (U. S.) 418 (1870); *State v. Lancaster*, 63 N. H. 267 (1884); *Wiley v. Farmer*, 14 Ala. 627 (1848); *Board of Education v. Illinois*, 203 U. S. 553 (1906); *Travellers' Ins. Co. v. Connecticut*, 185 U. S. 364 (1902); *Estate of Mahoney*, 133 Cal. 180, 65 Pac. 309 (1901); *Estate of Johnson*, 139 Cal. 532, 73 Pac. 424 (1903); *Maxwell v. Edwards*, 89 N. J. L. 446, 99 Atl. 207 (1916).

²² *People ex rel. Farrington v. Mensching*, *supra*. See, on the general subject of this note, Thomas Reed Powell, "Extra-territorial Inheritance Taxation," 20 COL. L. REV. 1.

¹ *Luther v. Border*, 7 How. (U. S.) 1 (1849).